No. 10383.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THOMPSON PRODUCTS, INC.,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT.

PAUL R. WATKINS,
RICHARD W. LUND,
AUSTIN H. PECK, JR.,
411 West Fifth Street, Los Angeles 13, California,
Attorneys for Respondent.

FILED
JAN 2 3 1944
PAUL P. O'BRIEN
CLERK

Parker & Baird Company, Law Printers, Los Angeles

TOPICAL INDEX.

PAGE

I.

The petition for enforcement of the Board's order must be denied under the National Labor Relations Board Appropriation Act, 1944, which stabilizes bargaining relations for the duration 2

A. The "Hare Rider" to the National Labor Relations Board Appropriation Act, 1944, amended the National Labor Relations Act 4

B. The proviso precludes the enforcement of the Board's order 21

C. Petitioner's contentions that the Board's use of its funds is not subject to judicial review and respondent may not challenge an improper use are without merit........ 29

II.

The statements of respondent to its employees were constitutionally privileged 31

Conclusion 32

TABLE OF AUTHORITIES CITED.

Cases.

PAGE

National Labor Relations Board v. Baltimore Transit Co., Case No. 5103 (C. C. A. 4th), October 5, 1943 3

National Labor Relations Board v. Cowell Portland Cement Co., Case No. 10374 (C. C. A. 9th), ruling from the bench September 7, 1943 2

National Labor Relations Board v. Elvine Knitting Mills, Inc., 138 F. (2d) 633 (C. C. A. 2d, Oct. 26, 1943) 3

United States v. Dickerson, 310 U. S. 554, 558, 60 S. Ct. 1034 ..... 4, 17, 18, 20

Miscellaneous.

89 Congressional Record 6046, Vol. 89, 78th Congress, 1st Session 5

12 Labor Relations Report 595, 596 26

12 Labor Relations Report 805, 806 ..... 24, 26

13 Labor Relations Report 165 3

13 Labor Relations Report 236 26

Second Annual Report of the National Labor Relations Board (1937), 18 23

Statement of National Labor Relations Board, House Subcommittee Hearings, p. 316 25

Statutes.

Act of June 14, 1935, Ch. 241, 49 Stat. 341, 356 20

Act of April 27, 1937, Ch. 140, 50 Stat. 96, 107 20

Act of July 1, 1937, Ch. 423, 50 Stat. 442 20

Act of July 15, 1939, Ch. 281, Pub. 176, 76th Cong., 1st Sess., p. 6 20

National Labor Relations Board Appropriation Act, 1944 (Title IV, Labor-Federal Security Appropriation Act, 1944, Pub. 135, Chap. 221, 78th Cong., 1st Sess., H. R. 2935, Approved July 12, 1943) 2

PAGE

National Labor Relations Board Appropriation Act, 1944, amended the Wagner Act........ 18

Wagner Act, Sec. 8........ 23

Wagner Act, Sec. 9(c)........ 22, 23

Wagner Act, Sec. 10........ 23

Wagner Act, Sec. 10(a)........ 22

Wagner Act, Sec. 10(b)........ 22

Wagner Act, Sec. 10(c)........ 22

Wagner Act, Sec. 10(e)........ 22

Wagner Act, Sec. 10(f)........ 22

Wagner Act, Sec. 10(g)........ 22

No. 10383.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THOMPSON PRODUCTS, INC.,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT.

This Supplemental Brief in reply to the Supplementary Memorandum of Petitioner is filed pursuant to permission of the Court. We reply herein to the arguments of the petitioner on the following two issues: (1) Whether a rider in the Board's Appropriation Act for the current fiscal year requires the Court to refuse to grant the petition for enforcement; and (2) Whether certain statements made by respondent were constitutionally privileged as an exercise of free speech.

I.

The Petition for Enforcement of the Board's Order Must Be Denied Under the National Labor Relations Board Appropriation Act, 1944, Which Stabilizes Bargaining Relations for the Duration.

In its Supplemental Brief, petitioner presents four arguments in answer to our contention that the Board's petition for enforcement of its order must be denied under the National Labor Relations Board Appropriation Act, 1944 (Title IV, Labor-Federal Security Appropriation Act, 1944, Pub. 135, Chap. 221, 78th Cong., 1st Sess., H. R. 2935, Approved July 12, 1943), and contends that in three cases this issue has already been determined contrary to our position. We will separately consider these four arguments, but at the outset we wish to point out that the issue here presented has not yet been decided by any court.

The first case relied upon by petitioner is that of *National Labor Relations Board v. Cowell Portland Cement Co.,* Case No. 10374 (C. C. A. 9th), ruling from the bench September 7, 1943. In its Reply Brief herein, petitioner said of the above case:

> "The Board is advised by its counsel that the grounds of the Court's action, as indicated by statements of the members of the Court at the oral argument, are applicable here."

By a letter dated September 28, 1943, from Howard Lichtenstein, Assistant General Counsel of the Board, we were "advised that the Board is striking from pages 1-2

of its reply brief the following [foregoing] statement." By this action petitioner conceded that the *Cowell* decision was not applicable here.

The ruling in the case of *National Labor Relations Board v. Baltimore Transit Co.*, Case No. 5103 (C. C. A. 4th), October 5, 1943, may have been made on several grounds not applicable here. In the first place, that case did not come within the scope of the Hare rider since a "complaint" had been filed within three months from the execution of the contract involved. Moreover, the ruling may have been decided on the ground, as the Board then contended, that the rider did not apply where the union was company-dominated (see 13 Lab. Rel. Rep. 165), a proposition now conceded by the Board to be erroneous (Petr. Supp. Memo., p. 10, note 10; footnote 15, *infra*).

The ruling in the case of *National Labor Relations Board v. Elvine Knitting Mills, Inc.*, 138 F. (2d) 633 (C. C. A. 2d, Oct. 26, 1943), was decided at least in part on the same erroneous ground. That case also involved a contract with a company-dominated union, and the Court sustained the Board's then position that for this reason "the present is properly not a case involving a labor agreement of the kind described in the statute." Moreover the Court noted that the "respondent substantially conceded at the argument" the Board's contentions. We do not concede them, and so far as appears this is the first case where a Court will have to squarely decide the issue presented and where the issue has been fully argued.

A. The "Hare Rider" to the National Labor Relations Board Appropriation Act, 1944, Amended the National Labor Relations Act.

Petitioner concedes, as it must, that under the decision of the United States Supreme Court in *United States v. Dickerson,* 310 U. S. 554, 60 S. Ct. 1034 (1940), "Congress can amend or repeal substantive legislation 'by an amendment to an appropriation bill, or otherwise' " and that the question here is whether Congress did so. We are also in agreement with petitioner that that question is resolved by determining the Congressional intent. We submit that an examination of the legislative history of the bill involved discloses beyond any reasonable doubt that Congress did intend to amend the National Labor Relations Act. This appears from the purpose of the legislation, direct statements on the floor of Congress (even those relied upon by petitioner as allegedly establishing the contrary), and repeated statements of objection by Congressmen to the enactment of substantive legislation in an appropriation bill. For the convenience of the Court, we will discuss the legislative history of the bill in detail.

During the course of hearings held by the House Subcommittee of the Committee on Appropriations on Labor Department and Federal Security Appropriations (May 29, 1943), John P. Frey, President of the Metal Trades Department of the American Federation of Labor voiced bitter objection to the action of the National Labor Relations Board in taking jurisdiction and in holding hearings in the case involving the Kaiser shipyards and similar cases for the purpose of setting aside existing collective bargaining agreements with unions allegedly not the proper representatives of the employees at the time the contracts were entered into. This action, under the Wagner Act,

it was asserted would cause considerable unrest and would have a disastrous effect on production. As a result of this statement and similar reports from other sources, when the Appropriation Bill was up for debate in the House on June 16, 1943, Representative Taber, a member of the Committee on Appropriations, offered an amendment to reduce the appropriation for the National Labor Relations Board by $500,000, or approximately one-fourth, scoring the Board in the following language (89 Cong. Rec. 6046)[1]:

> "I have done this because the Board, instead of attending to its own business, has gone out trying to promote labor disturbances between the different labor organizations. They have been caught at it red-handed. and the situation is such that out on the west coast they have attempted to create differences between two labor unions in the Kaiser shipyard and upset an agreement which has been of long standing with one of the organizations. When an organization of the Government gets into that kind of business it is time we put a crimp in some of their activities."

Representative Hare, Chairman of the Subcommittee, who introduced and was in charge of the bill, immediately opposed the proposed amendment on the ground that (p. 6046) "I do not see where the matter that he complains of would be corrected by reducing the appropriations" but would render the Board incapable of effectively carrying out its functions. He pointed out that if the proposed Taber amendment carried he would offer a specific amendment designed to correct the evil complained of.

---

[1]Unless otherwise indicated, all page references hereinafter are to Volume 89 of the Congressional Record, 78th Congress, 1st Session.

Taber's amendment carried, and Hare then offered his proposed amendment to the bill adding the following proviso to the appropriation for the Board (p. 6047):

> "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for 3 months or longer without complaint being filed."

He explained the purpose of his amendment as follows (p. 6047):

> "It simply means that the National Labor Relations Board will not be charged with the responsibility, nor will it have the authority or right to take jurisdiction of a complaint unless the contract under which the complaint is made has not been in force for as much as 3 months. Where an agreement between management and its employees has been in operation for as long as 3 months or more and no complaint has been filed by management or no formal complaint filed by the employees, National Labor Relations Board would not have jurisdiction and would be relieved of any duty or expense until the availability of these funds expires."

After very brief discussion and with no apparent opposition, the amendment was agreed to (p. 6047). The bill was passed the same day.

During the course of the hearings held on the bill by the Subcommittee of the Committee on Appropriations of the Senate, the Subcommittee on June 22, 1943 took up the matter of the Hare rider to the bill. At the outset of this discussion the Subcommittee introduced in the record a short, one page written statement presented by the Na-

tional Labor Relations Board and a copy of a press release issued by the Board on June 18, 1943 (Hearings, p. 288). The Board opposed the Hare rider in the second part of the statement, under the heading: "II. *Substantive Amendment* of the National Labor Relations Act." Similarly in the press release, the Board complained "of the *amendment* to the National Labor Relations Act, adopted in the heat of debate yesterday." Further, Gerard D. Reilly, acting chairman of the National Labor Relations Board, opposed the Hare rider, defended the Board's action in the Kaiser case, and objected that (Hearings, p. 304) the amendment "goes much further than merely placing cases like the *Kaiser case* beyond our *jurisdiction*. . . . It would *legalize* contracts with company-dominated unions."

During the course of the statement made before the Subcommittee on the same day by Mr. Frey, Senator Truman expressed objection to the Hare rider on the grounds (Hearings, p. 336) that he did "not want to hamstring the Wagner Act, and I believe this amendment would absolutely put the Wagner Act out of business" and that the matter should be handled by legislative committees.[2]

---

[2] "Senator TRUMAN. But I am afraid of yellow-dog contracts and several other things that could creep in. I agree that there ought to be a statute of limitations, but that ought to be done by the legislative committees of the House and the Senate, and it ought to be done very carefully." (Hearings, p. 336.)

"Senator MEAD. As I understand the observations made by Senator Truman, his mind is not closed on the subject. He feels rather kindly toward the treatment of this matter by a legislative committee. In doing so, he is anxious to protect the rights of labor from the yellow dog contracts and other weakening influences.

"Senator TRUMAN. I think it is the most important thing that has been done since the Wagner Act was passed. I think it ought to be handled by a legislative committee, which can get the job done in the way it should be done. Stabilization is what we are after." (Hearings, pp. 343-344.)

Following the statement of Mr. Frey, Hoyt S. Haddock, legislative representative of the C.I.O., appeared before the Subcommittee and made the following pertinent comments (Hearings, p. 346):

> "However, the fact is that the amendment was not offered under circumstances which could possibly be conceived as appropriate or legitimate. *The amendment obviously contemplates a change in the substance of the National Labor Relations Act.* It *is not something that has to do merely with finances.* This practice of attempting to alter the provision of substantive legislation by riders attached to appropriations is a practice which is morally indefensible. It perverts the normal procedures of legislation and is an insult to the integrity and intelligence of both Houses of Congress. I know that this body has frowned upon it. I sincerely trust that this kind of maneuver in this instance will be rejected in terms so unmistakable and blunt as to discourage tactics of this kind in the future."

On June 24, 1943, the Senate Committee on Appropriations submitted its report on the bill (S. Rep. 342, p. 4) in which it recommended that the Hare rider be stricken. When this proposed committee amendment was taken up for consideration in the Senate on June 26, 1943, Senator Bridges offered a substitute for the proposed Committee amendment, adding the following to the Committee's bill (p. 6648):

> "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor, copy of which has been filed with the Labor Department for 3 months or longer without complaint being filed by a labor organization."

It should be noted that except for one change this proposed amendment was word for word the same as the Hare rider and the provision finally enacted. The only difference was that Bridge's proposal required the labor agreement to be filed with the Department of Labor for three months in order to prevent it from being attacked, whereas in the Hare rider it was only required that the agreement have been in existence for three months. This change in language was designed to meet one objection voiced by the Board during the course of the Senate Subcommittee hearings, and that was that agreements could be entered into and kept secret for three months and then they would no longer be subject to attack. Set forth below is the provision finally adopted. The Hare rider consisted of that part preceding the "Provided", and the Bridges amendment was the first twenty-nine words of the Hare rider with the additional words set forth in square brackets:

> "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor [, copy of which has been filed with the Labor Department for 3 months or longer without complaint being filed by a labor organization.] which has been in existence for three months or longer without complaint being filed: *Provided,* That, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person."

During the course of debate on Senator Bridges' proposed amendment, objection was voiced on the ground that

the National Labor Relations Act should not be amended without the matter being considered by a legislative committee.[3] Senator Truman, who had expressed himself during the Subcommittee hearings as being opposed to the Hare rider, likewise opposed the Bridges amendment on the ground (p. 6649)[4] that if the amendment were adopted "it will not go to conference, and it is most dangerous *to legislate* in this manner in an appropriation bill. . . . I do not believe we should *repeal the National Labor Relations Act* through an amendment offered on the floor of the Senate, without any consideration of the committees of the House and the Senate having to do with Labor matters. *That is exactly what this amendment would do.*"

Senator McCarran, Chairman of the Subcommittee in charge of the bill, objected to the proposed amendment on the same grounds, during the course of which he made the statements quoted in petitioner's Supplemental Brief (page 8, note 7) as allegedly indicating that the proviso finally adopted did not amend the Wagner Act. As a matter of fact, these statements, which we quote in full, clearly establish that the effect of the rider was to amend the Wagner Act and it was because of that fact that Senator

---

[3]"Senator Lodge. ". . . My confusion in regard to this proposal is a good illustration of why matters of this kind should go to legislative committees, and not appropriation committees" (p. 6648).

[4]"Mr. Truman. In the condition in which the committee amendment now is, it will go to conference, and any change the Senator from New Hampshire [Mr. Bridges] might want may then be considered by the conferees. If the Senator's amendment shall be adopted, I am very sure it will not go to conference, and it is most dangerous to legislate in this manner in an appropriation Bill.

"I listened to my able colleague from Maine [Mr. Brewster], who is on the special committee with me, and he stated the facts as they are, but I do not believe we should repeal the National Labor Relations Act through an amendment offered on the floor of the Senate, without any consideration of the committees of the House and the Senate having to do with labor matters. That is exactly what this amendment would do."

McCarran opposed the Bridges Amendment. It must not be overlooked that the proposed amendment of Senator Bridges, except for the provision requiring labor agreements to be filed or notice thereof posted, was identical with the Hare rider and the provision as finally enacted. His proposed amendment, therefore, so far as the question here under consideration is concerned, would have had the same effect as the provision finally enacted. Senator McCarran, whose committee had recommended striking out the Hare rider without offering any substitute, while agreeing that stabilization of labor relations was desirable, opposed the Bridges' amendment because such legislation should not be enacted in appropriation bills and because if the amendment were adopted, since it was practically identical with the Hare rider, the House would also approve it and the matter would not even go to conference to work out an entirely satisfactory provision. Thus when Senator McCarran stated (as quoted by petitioner) in opposing the Bridges Amendment that (p. 6650) "The Senate Committee has identically the same idea that the Senator from New Hampshire [Bridges] has in many respects, but we do not in appropriations bill propose to amend or alter or nullify a legislative act which has been passed by Congress and which has received Executive approval;" he was objecting to the Bridges amendment because that is exactly what it would do. Yet, as noted, the final provision was in identical language with the Bridges amendment, except for the filing requirement, and would have the same effect. Senator McCarran was immediately asked if he was "in sympathy with the objective of stabilizing labor relations at this critical period" and whether "any appropriate language designed to prevent the reopening of, let us say, somewhat aged con-

tracts, would be in accord with the Senator's views?" He replied, "Yes", and commented (p. 6650) "All members of the committee are in favor of stabilizing labor conditions, and *if* we could so do without destroying the Wagner Labor Relations Act, we would. At the same time, we do not *want to* destroy an act which has been passed by Congress after long debate and consideration." Senator McCarran's hope, as set forth in the foregoing statement (quoted by petitioner) that the Wagner Act could be saved from nullification by rewriting the disputed provision in conference was not realized, because the language of Senator Bridges' amendment and the Hare rider was adopted finally. This is further shown by the discussion that immediately followed, set out in footnote,[5] which includes the third quotation of Senator McCarran set forth in petitioner's brief.

---

[5]"Mr. SHIPSTEAD. I may have misunderstood the Senator who is in charge of the bill. I understood him to say he did not think this matter was one which should be handled on an appropriation bill.

"Mr. McCARRAN. I said, or at least I intended to say, that I did not think an appropriation bill was the proper place in which to set aside the force and effect of a legislative act.

"Mr. SHIPSTEAD. Does the Senator think that in conference a satisfactory amendment could be worked out which would not do that, and yet at the same time would achieve a remedy for the situation?

"Mr. McCARRAN. My wish will be the father of my thought, and I express my thought, and say I hope so. That is all I can say. But if the amendment of the Senator from New Hampshire should prevail, I am confident it would tie the hands of the conferees.

"Mr. BREWSTER. Mr. President, will the Senator yield?

"Mr. BRIDGES. I yield.

"Mr. BREWSTER. The Senator from Nevada will agree, I am sure, that the mere enactment of a statute of limitations would not be considered as vitiating the act.

"Mr. McCARRAN. No; and that is just what we do not want to accomplish. We want to provide limitations which will be wholesome for the welfare of the country in this unhappy hour, but we do not want to vitiate the act" (p. 6650).

After the above discussion, Senator Bridges withdrew his amendment, stating (p. 6651):

> "Mr. President, so far as I am concerned, I am willing to accept the statement of the chairman of the committee, and not to force at this time the amendment I have offered, with the understanding that the problem of stabilization of conditions in labor relations will be considered, and that we shall have some settlement along that line."

To this Senator McCarran replied (p. 6651):

> "Mr. President, I am afraid the Senator has used language with which I would not want to go along. I would not go that far. So far as the stabilization of labor conditions in the country at the present time is concerned, I think I speak for the entire committee when I say that we are in favor of doing anything and everything reasonable to stabilize conditions. But we cannot say to the Senator, and I will not say to him, that we will go so far in dealing with the subject *as to set aside an existing statute.* I would not be so unfair to the Senator as to say that."

Thus, Senator McCarran cautioned that the conferees might not go so far as the Bridges amendment and "set aside an existing statute." Yet the final provision did not change Bridges' language. Consequently, the statements of Senator McCarran, in charge of the bill, establish conclusively that the effect of the rider to the appropriation bill was to amend the Wagner Act.

In view of the understanding that the matter would go to conference with some effort to be made to stabilize labor relations without, if possible, repealing the Wagner

Act, as Bridges amendment proposed, the committee's amendment striking out the Hare rider was approved without further discussion (p. 6656).

The conference committee submitted its report on June 30, 1943, in which it proposed without comment that the Hare rider be restored *verbatim* and the proviso added relative to posting a notice of the agreement (p. 6961). In the House, on July 1, 1943, Hare of South Carolina moved to adopt the conference recommendation. Representative Smith of Virginia, the most persistent and vigorous critic in the House of the National Labor Relations Board, opposed the proposal because of its effect in amending the Wagner Act, stating (p. 7023):

> ". . . If you vote for the motion of the gentlemen from South Carolina you *amend* the National Labor Relations Act by taking away the *jurisdiction* of the National Labor Relations Board to investigate these contracts . . ."

To this Representative Tarver, a member of the subcommittee and a conferee, replied (p. 7023):

> "The purpose of the amendment has been correctly diagnosed by the gentleman from Virginia . . .
>
> "Those who entertain the views of the gentleman from Virginia, that the National Labor Relations Board jurisdiction in that case ought not to be removed should, of course, support his motion . . ."

Mr. Tarver subsequently pointed out that (p. 7026):

> "This is not a *permanent* amendment to the National Labor Relations Act. This is an emergency measure."

As on each occasion before when this matter was discussed, objection was voiced to the enactment of substantive legislation in an appropriation bill,[6] Representative Smith stating in this connection (p. 7023):

> ". . . It is impossible to predict what may be the ultimate effect of trying to write such an *amendment* to the Labor Relations Act in an appropriation bill here on the floor of the House when 9 out of 10 Members do not understand what it is."

The spectacle of Representative Smith, who at one time was chairman of a House committee that investigated the National Labor Relations Board, defending the Wagner Act caused one representative to ask (p. 7023), "Is the gentleman defending the National Labor Relations Board at the present time?" to which Mr. Smith replied, "I am defending the act of Congress as it is and I am defending the jurisdiction of the Board to do the things that the Congress told them to do."

In its Supplemental Brief (p. 7) petitioner quotes a statement to Representative Hare that "There is no attempt to amend the National Labor Relations Act." When that sentence, occurring in the middle of a paragraph, is examined in the light of the discussion immediately preceding it, there can be no question that Mr. Hare only meant that the Wagner Act was not vitiated

---

[6]"Mr. O'Neal. ". . . What evil is there in the existing law that requires a committee to take some legislative action on an appropriation bill?" (p. 7024).

"Mr. Anderson. [A member of the Subcommittee and a conferee.] . . . Personally I felt the place to iron out labor legislation was before the proper legislative committees of the House and not before the Appropriations Committee. I do think it is bad legislation, but I certainly was in no position to be an expert upon it, and I simply went along with the group" (p. 7025).

because employees would still be protected thereunder. Representative Smith was objecting to the proposal on the ground that it prevented employees from selecting their bargaining agent under the Wagner Act. Hare replied that this was not so, the employee was still protected under the Wagner Act; all that the amendment did was to prevent him from changing his mind after three months during which period he could attack any collective bargaining agreement before the NLRB. We quote Representative Hare's statement in full in the footnote.[7] On the other hand, when an employee filed a complaint after notice of an agreement had been posted for three months as required, then, according to Hare (p. 7025), "The Board would not have jurisdiction to investigate that case." The conference report was adopted without much further debate (p. 7027).

In the Senate on July 2, 1943, the proposal made in the conference report was vigorously objected to, in addition to others, by Senator Wagner,[8] the author and champion of the National Labor Relations Act, Senator Tru-

---

[7]"Mr. Hare. That is right. If he acquiesces in it for 3 months and makes no complaint, the idea is that he is satisfied. He has had plenty of time to consider it, plenty of time to deliberate. If somebody comes along and makes him dissatisfied after that, then he is stopped from expressing his dissatisfaction. The purpose of this amendment is to prevent racketeers interfering with the production in the war industries of this country. There is no attempt to amend the National Labor Relations Act. This is only an attempt to have orderly procedure and orderly conduct and, if people are satisfied, to prevent some racketeer from bringing in additional information, or new news, so to speak, and arranging in some way to discourage production in a plant or production in another plant, thus continuing to have turmoil throughout the country in our war-production plants" (p. 7024).

[8]"Mr. Wagner. Mr. President, the proposed amendment concerning closed-shop agreements would practically repeal the Labor Relations Act. . . . We passed the Labor Relations Act because we wanted to do away with Company unions. No one objects to that, but what is proposed here will in effect authorize a company union" (p. 7104).

man,[9] a member of the Subcommittee and a conferee, Senator Ball[10] and Senator Reed.[11] They objected on the specific grounds that the provision would amend the Wagner Act and that it was not a proper provision to be inserted in an appropriation bill.[12] The need for stabiliza-

---

[9]"Mr. Truman. Mr. President, I hope the Senate will reject this amendment. I think it is a vicious piece of legislation to attach to an appropriation bill. It would virtually repeal the Wagner Act and would not stabilize anything. I believe it would result in more trouble than good.

"My colleague from Minnesota has stated correctly the evidence which was collected by the special committee of which I am the chairman. We heard all sides of the controversy, and this amendment is merely the result of the desire on the part of the American Federation of Labor on the west coast to maintain an agreement which was entered into by a very small number of men employed in the plant of Mr. Kaiser. It is not a proper amendment to be put on an appropriation bill at this time. I sincerely hope that the Senate will reject it and send it back for further consideration by the conference committee. I also sincerely hope that the Senate will never accept it" (p. 7103).

[10]"Mr. Ball. . . . The American Federation of Labor sponsored this language, destroying a vital part of the Wagner Labor Relations Act, simply to stop the application of that law in this one case" (p. 7103).

[11]"Mr. Reed. The pending amendment would virtually repeal or nullify the Wagner Act, so far as the organizing of the men, or the right of men to vote for their collective-bargaining agencies is concerned" (p. 7104).

[12]In its Supplemental Brief (page 8) petitioner contends that such remarks "were at most expressions of a fear that the rider might be construed more broadly than was intended by its proponents. These fears must be treated as having been allayed by the reassurances given by the proponents. Certainly, we must look to the authors of a legislative act rather than to its opponents for our authoritative interpretation of its intent." The fallacy in this contention is that no reassurances were given. Further, while the statements of the Congressmen in charge of a bill (which, as we have seen, support our contention) may be entitled to particular consideration in determining legislative intent, the statement of other Congressmen, those opposing and those supporting the legislation, are entitled to considerable weight. We will not refer to the numerous decisions wherein the Supreme Court has relied upon such statements, but will merely point out that in the case of *United States v. Dickerson*, 310 U. S. 554, 558, 60 S. Ct. 1034, 1036, note 2 (1940), in holding that an amendment to an appropriation bill suspended a prior Act of Congress, the Supreme Court relied upon the statement of "Mr. Scott, one of the chief speakers against the amendment." Moreover, in the instant case, some of the opponents were Senator Wagner, the author of the Act being amended, Senator Truman, a member of the Subcommittee who participated in the hearings and a conferee, and Representative Smith (*supra*, page 14), who was more familiar with the National Labor Relations Act than any of the Appropriation Committee members, having at one time served as Chairman of the Special Committee of the House of Representatives, 76th Congress, 1st Session, appointed pursuant to H. Res. 258 to Investigate the National Labor Relations Board.

tion of labor relations was stressed by the Senators favoring the provision, and the conferees' draft was accordingly adopted (p. 7109).

We submit, in view of the above legislative history, that the National Labor Relations Board Appropriation Act, 1944, amended the Wagner Act, just as the rider in the Appropriation Act involved in the case of *United States v. Dickerson,* 310 U. S. 554, 60 S. Ct. 1034 (1940) suspended the enlistment allowance act under consideration therein. Petitioner asserts that the *Dickerson* case is not controlling "since the history of the legislation there involved left little room for doubt as to the Congressional intent." Yet in the *Dickerson* case, the provision of the appropriation bill involved which was held to have suspended the reenlistment allowance ("no part of any appropriation . . . shall be available for the payment") contained language significantly different from the prior appropriation bills which had suspended the re-enlistment allowance act (". . . the Act . . . is hereby *suspended* as to re-enlistments made during the fiscal year), thereby indicating a changed purpose. Moreover, in reaching its decision in that case the Supreme Court relied primarily on the statements of Congressmen, less positive than those quoted above herein, indicating that the effect of the amendment was to suspend the earlier act. In the case of the instant bill, the legislative history discloses positive and unequivocal statements in both Houses by those in charge of the bill, the committeemen and con-

ferees, the proponents of the rider and the opponents (including the author of the Wagner Act and also the most vigorous critic of that Act), by the National Labor Relations Board itself and witnesses testifying before the Senate Committee, that the rider would amend the National Labor Relations Act.

By the rider a statute of limitations was added to the Wagner Act applicable to the Kaiser and other pending cases.[13] The purpose was to stabilize collective bargaining relations and thereby prevent interruption and interference with production which results from the setting aside of collective bargaining contracts. It is true, as petitioner points out, that this statute of limitations was to be imposed for only one year, during the life of the appropriation bill. However, it was a war emergency measure, and it was believed that after a period of a year conditions would be such that there would be no further need for the provision, or if there were, an additional provision could be enacted at a later time (see quotations in petitioner's Supplemental Brief, page 9, note 9). The very fact that this was an emergency measure requiring only a limited period of relief, explains why the provision was enacted as part of an appropriation bill instead of in

---

[13]Since the Appropriation Act rider did not repeal the Wagner Act but only imposed a statute of limitations to be applied in cases of a certain type, the presumption against repeal by implication, referred to by petitioner (Supp. Brief, p. 7), is not here applicable.

a separate bill specifically amending the Wagner Act.[14] In any event, the fact that the provision is effective only for one year does not justify petitioner's conclusion that therefore it could not have been intended as a substantive amendment to the Wagner Act. Indeed in the *Dickerson* case, the Court held that the basic act there involved was suspended from year to year by each new appropriation act.

We submit there can be no question that the rider to the Appropriation Act amended the Wagner Act by removing the Board's jurisdiction for a period of one year to institute or proceed in a complaint case involving a labor agreement which has been in effect more than three

---

[14]Petitioner points out that in the cases in which it has been held that a statute has been amended by an Appropriation Act rider, "the statute affected was pecuniary in nature and therefore peculiarly subject to repeal or amendment by the withholding of funds" and no cases have involved rider amendments of "remedial social legislation creating substantial rights." While stating that this fact is significant, petitioner does not explain the significance and we fail to see it. Petitioner concedes (Supp. Memo., p. 4) that in the *Dickerson* case the Supreme Court held that "Congress can amend or repeal substantive legislation 'by an amendment to an appropriation bill, or otherwise'." The Court did not state that Congress could thus amend or repeal only statutes pecuniary in nature. As a matter of fact, the Wagner Act creates no private rights; it specifies certain action as an unfair labor practice, and gives to the National Labor Relations Board the "exclusive" power to "prevent any person from engaging in any unfair labor practice" (Sec. 10(a)). Thus the Wagner Act may be completely suspended by the withholding of funds from the Board.

The practice of amending substantive legislation by riders attached to appropriation bills has come into wide use during recent years. A few of the appropriation acts in which Congress has thus legislated are cited for illustrative purposes; Act of April 27, 1937, c. 140, 50 Stat. 96, 107 (limiting the number of midshipmen at the Naval Academy to a number less than required by existing law"); Act of July 1, 1937, c. 423, 50 Stat. 442, 464 (limiting active duty of Army reserve officers); Act of July 15, 1939, c. 281, Pub. 176, 76th Cong., 1st Sess., p. 6 (District of Columbia to insert legal advertisements less extensively than required by existing law); Act of June 14, 1935, c. 241, 49 Stat. 341, 356 (teaching of communism prohibited). In the last analysis, as petitioner concedes, the sole question herein is whether Congress intended to amend the Wagner Act, and the legislative history of the Appropriation Act establishes beyond question that Congress did so intend.

months before the complaint was filed. The instant case comes within the provision (Resp. Br. p. 6), and consequently the Court must refuse to sustain the Board's petition for enforcement of its order.

B. The Proviso Precludes the Enforcement of the Board's Order.

The petitioner contends that the Hare rider does not preclude the Board's use of its funds in the instant proceeding since the Comptroller General has ruled that the proviso does not apply to proceedings to enforce Board orders issued prior to July 1, 1943, and that this ruling is binding upon the Board. We submit that the Comptroller General's opinion is clearly erroneous and that it is not binding on this Court because in the first place, as pointed out above, the proviso amended the Wagner Act, and secondly, because of the equitable nature of this proceeding the Court may in the exercise of its discretion refuse to assist the Board in violating an Act of Congress.

The contention of the Board, which the Comptroller General accepted, is that the words "complaint case" in the proviso refer to a case "in the complaint stage" before the Board itself, "*i. e.*, in the stage preceding the issuance of a Board decision and order," and that any other construction would conflict with the legislative history of act (allegedly establishing that the purpose of the rider was to prevent the Board from issuing an order in the Kaiser and similar cases) and the provisions of the Wag-

ner Act (which allegedly draw a distinction between a "complaint," when the case is before the Board and a "proceeding" to enforce the Board's Order). This contention is without merit.

The Board in its letter to the Comptroller General (Pet. Supp. Br. App. A) pointed out that the Wagner Act in Sections 10(a), (b), and (c) refer to the issuance, serving, amending, answering, and sustaining or dismissing a "complaint," whereas Sections 10(e), (f) and (g) refer to "proceedings" before the courts. Petitioner's entire argument that Congress by the use of the words "complaint case" therefore referred to a case in the complaint stage before the Board itself is destroyed, because in Section 10(b) of the Wagner Act, relating to proceedings before the issuance of a Board decision and order, reference is made to intervention in "said proceedings" and the rules of evidence applicable in "such proceeding," and under Section 10(e) a court may, when the Board's order is before it on a petition for enforcement, order additional evidence taken before the Board.

There is no mystery as to what Congress meant by the words "complaint case." It meant a proceeding involving a charge or complaint that an employer has committed an unfair labor practice in violation of the Wagner Act. It is an unfair labor practice case. Congress did not use such descriptive language because such cases are always referred to as "complaint cases" since they are initiated by the filing of charges and the issuance of a complaint based thereon.

Two types of proceedings arise under the Wagner Act. The first, provided for by Section 9(c), involves a determination of collective bargaining representatives. The

second is covered by Section 10, headed "prevention of unfair labor practices," involving a determination by the Board as to whether there has been a violation of the Act (unfair labor practices defined in Section 8) and (*covered by the same section*) the enforcement of Board orders in such proceedings by Court review. "Complaint cases are those which are instituted by the filing of charges that employers have engaged in unfair labor practices affecting commerce within the meaning of Sections 8 and 10 of the act." *Second Annual Report of the National Labor Relations Board* (1937), 18. "All cases instituted by the filing of a petition, pursuant to Section 9(c) of the Act requesting an investigation and certification of representatives of employees, are called representation cases." (*Ibid.* p. 25.) Proceedings under Section 9(c), under Board practice, include the letter "R" preceding the Board's docket number; proceedings under Section 10 include the letter "C" preceding the docket number. Thus the instant proceeding is designated by the Board as number XXI-C-2088 [Tr. 1]. Among the Board's staff, attorneys, and those familiar with proceedings under the Wagner Act, Section 10 cases are always referred to as "complaint cases," or even more commonly merely as "C" cases, and Section 9(c) cases are referred to as "representation" or "R" cases.

Thus Congress in the Hare rider used the words "complaint case" to distinguish the representation case, not to distinguish between pre-Board order and subsequent Board order stages in complaint cases. This is shown by the hearings before the House subcommittee. Representative Hare asked Mr. John M. Houston, a member of the National Labor Relations Board, "Will you tell us

the difference between a complaint case and a representation case?" Mr. Houston replied (Hearings, p. 319) "Yes. That is in the statement which I have submitted to you on page 316." In the statement referred to, the Board discussed Wagner Act proceedings under two headings. "Representation Cases" and "Unfair Labor Practice Cases," the discussion under the latter heading concluding (Headings, p. 316):

> "In summary, unfair labor practice cases go through a constant sifting, due process being observed at all times and the Board being required to issue orders in about 7 percent of the cases filed, and litigation in the courts being resorted to in a much smaller percentage of the cases."

Before the Senate subcommittee, Mr. Gerard O. Reilly, acting chairman of the Board, pointed out that (Hearings, p. 291) "We have two kinds of cases, complaint cases and representation cases." Just after the Appropriation Act was passed, Robert B. Watts, General Counsel of the Board, issued instructions to the Board's staff relative to the application of the Hare amendment to the Appropriation Act in which he stated (12 Lab. Rel. Rep. 805, 806) "1. The amendment applies only to complaint and not to representation cases."

There is no doubt therefore that Congress used the common designation "complaint cases" to distinguish representation cases. A complaint case involves various stages of proceeding, issuance of complaint, pre-hearing motions, etc., Board hearing, trial examiner's report, hearing before the Board itself, Board order, non-compliance, court petition for enforcement of the order. A complaint case is not concluded until some final and bind-

ing order is entered. An order of the National Labor Relations Board "is not self-enforcing. There are no fines or penalties for its violation. The order remains in this status unless and until enforced by a Circuit Court of Appeals" (Statement of National Labor Relations Board, House Subcommittee Hearings, p. 316). Obviously, therefore, when the Board in a "C" case seeks enforcement of its order based upon its complaint, the proceeding is but another stage in the "complaint case." Furthermore, even if you assume the validity of the Board's construction of "complaint cases," the Appropriation Act did not prohibit use of the funds "*in* a complaint case" or in the "complaint stage" as the Board argues, but "in *any way* in *connection* with a complaint case." So even under the Board's construction, the language prohibits use of funds in the Circuit Court of Appeals, since such funds would be used in a way in connection with a complaint case.

That this is the proper construction of the proviso is supported by the legislative history of the Appropriation Act. In the first place, in its one page written statement submitted to the Senate Subcommittee, the Board referred to the status of the *Kaiser* cases, "hearings in which have been completed, leaving only Board decision and court review" (Hearings, p. 288). It is inconceivable that Congress could have intended that the principal purpose of the rider—to prevent the setting aside of the Kaiser collective bargaining contracts—could have been avoided simply by the issuance by the Board of its order in the *Kaiser* cases prior to July 1, 1943. Obviously, Congress intended that collective bargaining contracts in effect should not be set aside so long as no com-

plaint was filed relative to them with the Board within three months from the time of their execution. In the instant case, the petitioner is seeking to have this Court set aside just such a contract.

The statements of Mr. Frey and the Congressmen relied upon by petitioner [Supp. Memo. App. A, pp. 5-6] do not establish that the purpose of the proviso "was to prevent the Board from deciding the *Kaiser* cases and from issuing complaints during the 1944 fiscal year in similar cases."[15] The purpose, as clearly appears from these statements and the many others heretofore quoted (See also Resp. Br. pp. 49-51), was to stabilize or "freeze" existing collective bargaining relations, or as stated by Congressman Tarver [Petr. Supp. Memo., App. A, p. 6] "to prevent during those 12 months the interruption of production in those two shipyards or in any other plants which are similarly situated." Production is not interferred with by the issuance of Board orders. It is the carrying out of such orders, either voluntarily or pur-

---

[15]On June 17, 1943, the day after the House adopted the Hare rider to the Appropriation bill, the Board issued a statement opposing the Amendment on the ground, among others, that it would prohibit the Board from challenging contracts with company-dominated unions (12 Lab. Rel. Rep. 595, 596; Senate Subcommittee hearings, p. 288). However, after the Act was finally passed the Board took the position that the rider was meant to apply only to so-called raiding situations, such as in the Kaiser cases, and therefore did not prohibit the setting aside of company-dominated union contracts. (See statement of Robert B. Watts, General Counsel of the Board, 12 Lab. Rel. Rep. 805, 806.) This was the Board's position when it submitted its inquiry of July 20, 1943, to the Comptroller General. (Petr. Supp. Memo., App. A.) Subsequently, on October 21, 1943, the Comptroller General correctly ruled (see Resp. Brief, pp. 7-10), that the rider had a much broader scope and was applicable to all collective bargaining contracts, irrespective of whether or not the union was allegedly company-dominated. (13 Lab. Rel. Rep. 236.) The Board has now accepted this ruling, and therefore concedes that the rider applies to the instant case unless it is inapplicable to any complaint case where the Board's order was issued prior to July 1, 1943. We shall not, therefore, discuss the legislative history which shows that the rider was not limited to the so-called raiding situations and is applicable to cases of the character here involved.

suant to court decree, by the setting aside of existing contracts which creates the disturbing situation. Stability is not achieved if existing contracts which the Board ordered prior to July 1, 1943 to be set aside (which probably equal the number the Board would have ordered set aside in the 1944 fiscal year in the absence of the proviso) are upset after the passage of the Appropriation Act, and only those are left undisturbed concerning which no Board order had been issued prior to July 1, 1943. The intent of Congress to stabilize conditions can only be given effect if existing collective bargaining agreements are not disturbed whether or not the Board had issued an order prior to July 1, 1943. Enforcement of an order can only be compelled by the Board filing a petition for enforcement in the Circuit Court of Appeals, filing briefs, etc. Use of the Board funds (upon petitioner's theory that the rider only limited use of funds) for such a purpose was prohibited by the proviso where a collective bargaining agreement was in effect, though, as in the instant case, the Board's order was issued prior to July 1, 1943.

We submit that the proviso clearly applies to the enforcement stage of a complaint case. Petitioner asserts, however, that it is bound by the ruling of the Comptroller General to the contrary and contends that this ruling is "conclusive upon the executive branch of the Government." Petitioner cites no authority and apparently does not even contend that the ruling is binding on the judicial branch of the Government. Moreover, it should be noted that the ruling does not *require* the expenditure of funds in a case of this character; the Comptroller General merely ruled that the proviso does not preclude the Board from spending funds in seeking enforcement of orders issued prior to July 1, 1943.

If, as we submit is the fact, the proviso amended the Wagner Act, then the erroneous ruling of the Comptroller General can have no effect. This Court must give effect to the rider and refuse to enforce the Board's order in this complaint case which affects an existing collective bargaining contract. Petitioner does not contend otherwise. On the other hand, if, as petitioner does contend, the proviso did not amend the Wagner Act and merely prohibits the use of Board funds, the Court should nevertheless refuse to enforce the Board's order. The Comptroller General's ruling is, as we have shown, contrary to the intent of Congress. This Court should not permit the will of Congress to be flouted because of this erroneous ruling. Petitioner is in this Court seeking equitable relief in the form of an injunction. Citations for the proposition that proceedings of this character are of an equitable nature are not even necessary. This Court is clearly empowered to and should, in its discretion, refuse to grant the relief prayed for in view of the fact that Congress, in the interest of all-out war production, has (on petitioner's theory that the proviso does not amend the Wagner Act) prohibited the use of the appropriated funds in cases of this character.

In summary, we submit that the Appropriation Act rider applies to complaint cases in any stage, that the rider amended the Wagner Act so that at the present time the petition for enforcement cannot be granted under the Act as thus amended, and that even if the proviso be construed as not actually amending the Wagner Act, nevertheless the Court in its discretion should give effect to the will of Congress and refuse to enforce the Board's order.

C. PETITIONER'S CONTENTIONS THAT THE BOARD'S USE OF ITS FUNDS IS NOT SUBJECT TO JUDICIAL REVIEW AND RESPONDENT MAY NOT CHALLENGE AN IMPROPER USE ARE WITHOUT MERIT.

Petitioner argues that even if the Comptroller General's opinion is erroneous (1) the Board's misuse of appropriated funds is a question exclusively within the province of the legislative department and therefore is not subject to judicial scrutiny, and (2) respondent will suffer no "direct injury" as a result of this illegal use by the Board of its funds and therefore has no standing in this Court to challenge this illegal use. It should be noted that the second of these two propositions establishes the unsoundness of the first. The second involves a concession that the question is not one outside of the province of the judiciary to inquire into where the litigant does show "direct injury." Moreover, both propositions are based upon the assumption that the rider did not amend the Wagner Act but merely limited the Board's use of its funds. Neither of these arguments, the Board concedes, has any validity if, as we contend, the rider amended the Wagner Act.

But even if we assume that the rider merely imposed a limitation upon the use of funds by the Board, the contentions of petitioner are unsound. In the first place it should be noted that we are not here seeking to enjoin the Board from making illegal expenditures, as was the situation in the cases relied upon by petitioner. The petitioner's "direct injury" cases, therefore, are not relevant herein. In this case the Board is the petitioner. It is asking this Court to enter an injunctive decree. In its Supplemental Brief petitioner contends that the Court

should grant the prayed for decree even though Congress has definitely declared, by a prohibition on use of funds, that, in the interest of all-out war production, existing collective bargaining relations are not to be disturbed. We are certain that this Court will not subscribe to such an unsound doctrine. Nothing in the doctrine of separation of powers requires such a result.

It is, of course, one of the primary duties of this Court to construe and give effect to Acts of Congress. Petitioner is asking this Court to sustain its interpretation of the National Labor Relations Act that the evidence justified the Board's order and to enter a decree enforcing the order. But Congress has declared that as an emergency measure such orders, even if otherwise proper, should not be enforced. We do not believe it possible that the Board can be sustained in its contention that its order is proper under the Wagner Act and must be enforced though a later Act of the same Congress declares that it should not be, even if this latter directive be construed merely as a limitation on the use by the Board of its funds for such a prohibited purpose. Petitioner cannot reasonably expect this Court to consider one Act of Congress and ignore another. Petitioner is praying for certain equitable relief in this Court. The relief should be denied where Congress, even though only by a prohibition of use of funds, has declared that Board orders should not be issued or enforced under the circumstances here present.

II.

The Statements of Respondent to Its Employees Were Constitutionally Privileged.

In our Brief herein (page 37) we contended that certain statements allegedly made by respondent's supervisory employees and relied upon by petitioner in its Opening Brief (pp. 15-17) did not amount to interference and were constitutionally privileged. In its Supplemental Memorandum, petitioner seeks to answer our contentions, but actually does not refer to the same statements which we were considering. In its Supplemental Memorandum (p. 19) petitioner considers the legal effect of certain coercive statements allegedly made. We do not deny that coercive statements are not protected by the Constitution. Relative to these alleged statements, however, it is our contention that there was no substantial evidence of such interference since over a period of the five years covered by the Record (the union having delayed five years in filing its charge with the Board) respondent did not in fact discriminate against any union member—not disputed—and the only evidence of such allegedly coercive, isolated statements came from completely discredited witnesses whose testimony was worthless (Resp. Br. pp. 13-21, 25-29, 38-39).

Conclusion.

We submit, for the reasons set forth in our Opening Brief, that the Board's order is contrary to law and is not supported by substantial evidence. Actually, however, the Court should refuse to even consider the merits of the Board's petition because of the Appropriation Act rider. Relative thereto we submit that the rider applies to complaint cases, such as the instant one, in the enforcement or any other stage whether or not the Board entered an order before or after July 1, 1943. Such being the case, the Board concedes the rider applies to the instant proceeding, but defends its petition and its continued request for an enforcement order on the ground that it is bound by a ruling of the Comptroller General and respondent cannot challenge in this Court the illegal expenditure by the Board of such public funds.

To this there are three answers: (1) The Comptroller General's erroneous ruling does not require the expenditure of the Board's funds in prosecuting this hearing. (2) The Hare rider actually amended the Wagner Act: this being so, the Board concedes the Court must refuse to enforce its order. (3) Even if the rider be construed as only a prohibition on the Board's use of its funds. the Court should not assist the Board in ignoring the will of Congress that labor relations be stabilized during this critical period. The instant case is just the type that Congress meant the rider to apply to. Respondent is engaged in the production of vital aircraft parts, and has

been awarded the Army and Navy "E" for production excellence. To prevent interference with such vital production, Congress has declared that existing collective bargaining relations must not be disturbed. If a decree of enforcement were granted herein, the existing union-employer relationship and union contract would be upset with all the undesirable results on war production that Congress sought to avoid. The Board's petition for enforcement of its order should, therefore, be denied.

Respectfully submitted,

Paul R. Watkins,
Richard W. Lund,
Austin H. Peck, Jr.,
411 West Fifth Street, Los Angeles 13, California,
Attorneys for Respondent.